No. 16374

United States Court of Appeals
For the Ninth Circuit

THE PACIFIC TOW BOAT COMPANY, a corporation; and E. W. STUCHELL, WILLIAM D. CARPENTER, HARRY W. STUCHELL, JR., M. A. WYMAN, D. E. WYMAN and M. H. WYMAN, Co-Partners Doing Business as Eclipse Lumber Co., *Appellants,*

vs.

STATES MARINE CORPORATION OF DELAWARE, a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY TO BRIEF OF APPELLEE

BOGLE, BOGLE & GATES
CLAUDE E. WAKEFIELD
EDWARD C. BIELE
Proctors for Appellants.

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PRELIMINARY

Our brief fully sets forth sufficient reasons why the District Court should be reversed. We note appellee makes no response to important issues raised therein—particularly the undisputed chronology that damage occurred only after the steamer's mooring line was substituted for the tug's hawser and the COTTON STATE'S complete failure to minimize damage as the rotating propeller chewed up the scow for perhaps more than four minutes.

APPEAL OF ECLIPSE WITH RESPECT TO ITS LIABILITY TO STATES MARINE

Appellee's suggestion (Br. 4-5) that Eclipse cannot appeal its liability to States Marine is unfounded.

Both appellants appeal the award of *any* damages to States Marine. This raises the basic issue of the faults or lack of them on the part of the three vessels involved herein. Any liability on the part of Eclipse to States Marine must be based upon supposed faults of its dumb scow such as uncontrolled drifting into the COTTON STATE or a lack of lights — matters raised squarely by the appeal. Eclipse's recovery over from Pacific of any liability to appellee is merely secondary to the primary resistance to States Marine on the part of both appellants.

Contrary to appellee's argument, Eclipse is not fully protected. If Pacific is exonerated from primary liability to States Marine there can be no secondary liability of it to Eclipse regardless of any appeal. The MARY ETHEL, 2 Cir., 294 Fed. 525, 527, reversed on other grounds *sub nomine, Davis v. Donovan* (1924) 265 U.S. 257, 68 L.ed. 1008. Compare *Schiavone-Bonomo Corporation v. Buffalo Barge Towing Corporation,* 2 Cir., 134 F.(2d) 1022, cert. denied (1944) 320 U.S. 749, 88 L.ed. 445. The vice of appellee's argument is it would allow States Marine damages on a theory of recovery over by Eclipse from a not liable Pacific.

Further, Eclipse is not fully protected with respect to any allowance of full recovery against Pacific because the extent of Pacific's potential liability to

Eclipse is the sum of the decree's liability to States Marine plus the amount of Eclipse's own damages, a total of $32,523.50, plus interest now running. This is in excess of any security posted by Pacific and possibly available to Eclipse (Release and cost bond on tug LEA MOE, Tr. 11). Thus a review of the entire decree is necessary to protect Eclipse.

Even assuming for argument's sake that appellants did not technically appeal from that part of the decree which gives Eclipse recovery over from Pacific with respect to the former's liability to States Marine, appellee gets no comfort because these appellants contesting damages to appellee open up the jurisdiction of this Court concerning the whole decree giving any recovery to States Marine. The SAN RAFAEL, 9 Cir., 141 Fed. 270, 275; The MARY ETHEL, *supra.* After decision on the faults of the three vessels the mandate can direct an appropriate decree on any issue of secondary liability growing out of primary liability.

Finally, it has been clear throughout this litigation that as to States Marine what occurs between Eclipse and Pacific with respect to recovery over as between the tug and tow is *inter alios.* This is shown, for example, by the common appeal, the common supersedeas running to appellee, the common proctors, and the common brief. But each appellant resists any liability to the States Marine. If appellants do not contest recovery over between themselves, there is no prejudice to appellee which has adequate security from both Eclipse and Pacific as their respective release bonds show (Tr. 11, 13).

NO CASE FOR RULE OF PRESUMPTION OF FAULT AGAINST MOVING VESSEL

A review of all cases cited in Griffin on Collision, Sec. 25, p. 41, referred to by appellee (Br. 12) as calling for applicability of admiralty's presumption of fault against a moving vessel striking a moored or stationary one, failed to disclose a single holding comparable to the present case where the COTTON STATE was the consignee of the scows, her officers and crew participated in tying them up, and the capacity to control the scows was in those officers and crew members. In each of the referred to cases the moving vessel held at fault was a complete and total stranger to the stationary one. This is true in the specific cases cited by appellee:

The GRANITE STATE (1866) 3 Wall. 310, 18 L.ed. 179. A vessel lying at a pier struck by a steamer attempting to berth at a nearby dock.

Sehlmeyer v. Romeo Co., 9 Cir., 117 F.(2d) 996. A scow in tow of a tug struck a moored fishing vessel to which it was a stranger.

The MARIAN, 9 Cir., 66 F.(2d) 354. A drilling barge struck by a passing tow.

Failure to appreciate the distinction we point out was one of the District Court's fatal errors.

LIGHTS ON NO. 15 WERE NOT NEEDED FOR OBSERVATION FROM THE COTTON STATE

Our brief (P. 13-18) discusses the testimony of the witnesses from the COTTON STATE, including the chief mate, who saw, or should have seen, what was going on

with regard to the scows landing alongside. Appellee's answer (Br. 10-11) refers to technical sunset and gives limp excuses for the COTTON STATE's chief officer.

That gentleman's stated reason why he did not see the end of the scow No. 15 was not because of any lack of light on her, but because "the lumber was too high" (Tr. 132). The height referred to was the built up lumber cargo which extended perhaps fourteen feet up from the flat deck of the scow and occupied all but a few feet of her deck space. The chief officer observed the deck cargo sufficiently for him to describe it in detail. Moreover, it is important to bear in mind that the point of contact was some forty feet forward from the end of the No. 15, or thirty feet forward from the end of her lumber cargo which the mate was able to observe drift against the side of the steamer.

FAULT IN ABSENCE OF ANY CHECK ASTERN ON COTTON STATE WHEN PROPELLER STARTED

At 1840 the scows were landed alongside the COTTON STATE and simultaneously her propeller was started without any check or assurance to the engine room that the stern area was clear of obstruction or the likelihood of it. Appellee's witnesses testified to a practice for a deck officer to make an inspection astern before the propeller is started rotating. It failed to produce any one who made such a check. Its brief (Br. 16-18) seeks to exercise this fault with the plea that no statutory requirement, custom or usage calls for a lookout long after the jacking gear is engaged.

Those cases in our brief (P. 20) requiring a check

astern before starting up the propeller technically apply the general prudence requirement of Article 29 of the Inland Rules, 33 U.S. Code §221. Appellee's authorities are readily distinguished:

Robin v. U.S.A., S.D.N.Y. 1958 A.M.C. 451. Held no duty *to maintain* a lookout long after propeller started turning over.

Cape Friendship, D. Md. 1951 A.M.C. 814. After propeller started up no need for *continuing* watch when it was struck by a barge engaged in loading another vessel lying behind damaged vessel.

Kosnak v. The Norcuba, 2 Cir., 243 F.(2d) 890. Stranger launch specifically told to clear anchored vessel about to get under way. Launch attempted to maintain position on steamer for ten minutes after seeing propellers rotating and hearing anchor being lifted.

Hektor, D. Md., 1935 A.M.C. 336. Appellee's discussion (Br. 13) mistates our reference to this case. Its significance herein is: (1) A vessel is within her right to start her propeller only after making an investigation to see if stern area clear, and thereafter, no need to keep a lookout. (2) The ship was not responsible for collision because longshoremen aboard her, instead of her officers, mishandled mooring lines led to the barge. The Court stated: "I believe that a steamer lying at a wharf ought not to start her screw or propeller without carefully looking to see whether it is going to disturb any property or situation in proximity to it." This language exactly fits own case.

Appellee reasons that exhibition of warning signs is an adequate substitution for a check up on conditions of clearance astern when the jacking gear is about to be engaged. We note the chief officer's concession of a practice on the COTTON STATE to look astern "even though the signs are up" at least when getting underway (Tr. 264). Further on, however, he was more explicit with this testimony, "When they start the engine they (deck personnel) have to notify us that everything is clear — *they always do* and it is * * * " (Tr. 302). (Emphasis added) Other witnesses confirm this practice which was lacking in the present matter.

CONCLUSION

We refer to our brief and respectfully ask the Court to determine: (1) a lack of any faults upon appellants and their vessels, (2) sole fault upon the COTTON STATE, (3) the denial of the award of any damages, directly or indirectly, to appellee, and (4) the decree of all Eclipse's damages from appellee.

Respectfully submitted,

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